IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23/04/2003

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL NO.140 OF 1999
AND
C.M.P.NO.1841 OF 1999.

1.Shanmugham
2.Rojavathi ... Appellants

-Vs-

Sashikala ... Respondent

Second Appeal preferred under Section 100 of Code of Civil Procedure
for the relief as stated therein.

!For appellant : Mr.V.Nicholas

^For Respondent : Mr.S.M.Subramanian

:JUDGMENT
The above Second Appeal is directed against the judgment and decree dated 25.3.1998 rendered in A.S.No.28 of 1997 by the Court of III Additional District Judge, Dharmapuri at Krishnagiri as against the judgment and decree dated 12.3.1997 rendered in O.S.No.214 of 1993 by the Court of Subordinate Judge, Dharmapuri.

2. Tracing the history of the above second appeal coming to be preferred by the appellants what comes to be known it is the respondent herein who has filed the suit in O.S.Nos.214 of 1993 praying for a partition of the suit properties into six equal shares by metes and bounds and to allot one such equally divided share in his favour in all the suit properties and to put her in separate possession of the same wherein the suit properties are in three schedules viz. A,B and C. Schedule A is a tiled house measuring East West 22+ feet and North South 22+ feet valued at Rs.60,000/=, `B' schedule is a dry land measuring 3.38 acres with the standing tamarind tree thereon valued at Rs.3 lakhs and `C' schedule is cash of Rs.5,000/= in Lakshmi Finance, Marandahalli, with interest a total amount of Rs.6,000/=.

3. The case of the plaintiff, as narrated in the plaint, is that the suit`A' schedule property was originally belonging to the parents of the second defendant viz. Thambusamy Udayar and Meenakshi Ammal, which was allotted to the plaintiff's father Chinnappa Udayar and the second defendant

by a gift settlement deed dated 15.6.1961 and handed over possession of the same in their favour; that Chinnappa Udayar was living in the house of `A' schedule; that Meenakshi Ammal and Thambusamy respectively died in the years 1970 and 1971 and thereafter Chinnappa Udayar, plaintiff's father and the second defendant became entitled to the `A' schedule property thus Chinnappa Udayar becoming entitled to half share in the `A' schedule property; that both the Chinnappa Udayar and the first defendant were living as an undivided joint family and purchased `B' schedule suit property in the name of the first defendant by means of a sale deed dated 3.2.1983 for the benefit of the joint family for the reason that the first defendant was also a member of the joint family and therefore the plaintiff's father Chinnappa Udayar also became entitled to half share in `B' schedule; that the first defendant did not have any means to purchase the `B' schedule suit properties in her name.

4. The further case of the plaintiff is that during the lifetime of Chinnappa Udayar, he invested the `C' schedule cash amount of Rs.5,0 00/= in Lakshmi Finance of Marandahalli from out of the income of the joint family properties and therefore the `C' schedule should also be treated as joint family fund; that the said Chinna Udyar died on 28 .9.1991 for whom the plaintiff and the defendants are the heirs and therefore as per the law of succession, the plaintiff is entitled to 1 /6th share and in spite of the plaintiff having demanded partition of the suit properties in January, 1993 with the defendants, they did not concede her demands and hence the suit for partition and separate possession of the suit properties in the manner aforementioned with costs.

5. In the written statement, besides admitting the relationship of parties, the plaintiff being the daughter and the first defendant, the son of the deceased Chinnappa Udayar and the second defendant, the settlement deed dated 15.6.1961 would also be admitted by the defendants in the manner described in the plaint. But, they would deny the possession being handed over on the same day and that the second defendant and her husband stayed with the plaintiff; that after the death of Meenakshi Ammal and Thambusamy Udayar in the years 1970 and 1971 respectively, the suit `A' schedule property belonged to only the second defendant and at the time of execution of the settlement deed, the `A' schedule suit property was bequeathed only in favour of the second defendant and her husband was mentioned nominally therein and it was only the second defendant who was in possession of the suit `A' schedule property; that the husband of the second defendant did not own any property and he was doing coolie work; that after her marriage, her parents kept them in their house itself since they did not have any male descendant; that the second defendant's husband died on 28.9.1991 without leaving any property either as joint family property or self acquired and therefore it is false to allege that Chinnappa Udayar was entitled to half share in the `A' schedule suit properties.

6. The defendants would also deny that the second defendant and the first defendant living as a joint family, purchased `B' schedule suit properties in the name of the first defendant on 3.2.1983 by a sale deed from

out of the funds of the joint family; that it was the first defendant, who from out of his self-earning and selling away the jewels belonging to him, purchased the `B' schedule; that he was working as a Pharmacist in the Government Hospital from 1981 onwards; that the second defendant having sold the jewels weighing 10 sovns. given to her by her parents, purchased the `B' schedule property for a sum of Rs.18,690/= and from the date of purchase, it was the first defendant who was paying kist and in possession and enjoyment of the same; tht the first defendant's father did not have any right over the suit `B' schedule property at all and therefore it is utterly false to allege that the suit `B' schedule properties were purchased from out of the joint family income in the name of the first defendant and therefore in this property, the plaintiff is not entitled to 1/6th share, which is false; that the other allegation that Chinnappa Udayar during his lifetime from out of the joint family funds invested the `C' schedule cash is also false and denied; that the plaintiff was given in marriage at Marandahalli in the year 1973 adorned with jewels weighing 20 sovns. and giving cash and therefore she cannot claim 1/6th share in the suit schedule properties nor is true that the plaintiff was in possession of the suit properties; that in the last 22 years, the plaintiff was living in Bangalore and for nearly 15 years, there was absolutely no connection between the plaintiff and the defendant and there is no cause of action for the suit and on such grounds, the defendants would pray to dismiss the suit with costs.

7. The trial Court, having framed six issues, would allow the parties to record their respective evidence conducting a trial during which on the part of the plaintiff, besides examining herself as P.W.1, she would also examine yet another witness as P.W.2 for oral evidence. For documentary evidence, the plaintiff would mark three documents as Exs.A.1 to A.3, Ex.A.1 dated 15.6.1961 is the gift settlement deed in favour of Chinnappa Udayar and his wife Rojavathi, Ex.A.2 dated 3 .2.1983 is the certified copy of the sale deed executed in favour of first defendant by one M.V.Krishnamoorthy, Ex.A.3 dated 24.1.1983, the sale deed in favour of Kannan and Nagammal. On the part of the defendants, they would examine three witnesses for oral evidence as D. Ws.1 to 3 and would mark six documents for documentary evidence a Exs. B.1 to B.6, Ex.B.1 dated 1.9.1992 is the patta issued in favour of the second defendant, Ex.B.2 dated 23.12.1992 is the house tax receipt issued in favour of the second defendant, Ex.B.3 dated 15.6.1961 is the settlement deed in favour of Chinnappa Udayar and Rojavathi, Ex.B.4 dated 15.6.1961 is the copy of the settlement deed, Ex.B.5 dated 3.2 .1983 is the original sale deed and Ex.B.6 dated 26.2.1997 is the certificate issued by the Executive Officer of the Panchayat.

8. The trial Court, in consideration of these evidence placed on record and appreciating the evidence dealing with the same issue-wise, would ultimately arrive at the conclusion to hold that the plaint `A' schedule property is belonging to Chinnappa Udayar and the second defendant. So far as the `B' schedule properties are concerned, the trial Court would decide that this property is also a joint family property. Regarding `C' schedule property, the trial Court would conclude that the plaintiff has failed to prove the investment of the said amount of Rs.5,000/= by her father and therefore the `C' schedule property cannot be treated as a joint family property thus ultimately allotting 1/6th share by metes and bounds in favour

of the plaintiff in both `A' and `B' schedule properties further observing that the question of mesne profits from out of the said property shall be decided separately in accordance with Order 20 Rule 12 CPC and dismissed the plaintiff's claim regarding the `C' schedule property.

9. On appeal, the first appellate Court, having framed its own points for consideration, numbering six, would holding that the defendants are in possession and enjoyment of the `A' schedule suit properties and plaintiff is living at Bangalore with her husband; that by the gift settlement deed, the said property has been settled in favour of the second defendant and her husband and only the second defendant is entitled to half undivided share and therefore in the dwelling house `A' schedule property, the plaintiff being a female cannot seek for any partition herself till such time that the suit property is brought for partition by the male sharers and would decide that the plaintiff is not entitled to partition in the `A' schedule property, which is in possession of the male sharers. The appellate Court further observed that though the plaintiff cannot ask for a partition, she is entitled to 1/6th share, the first defendant 1/6th share and the second defendant 4/6th shares.

10. The first appellate Court would also decide that `B' schedule property is not the independent property of the first defendant and that the same is the joint family property; that accordingly, the first defendant and his father were each entitled to half share in it and therefore the plaintiff is entitled to 1/3rd share from out of the half share of her father thus in `B' schedule, she is entitled to 1/6 th share. Aggrieved, the defendants have come forward to prefer the above second appeal.

11. During arguments, the learned counsel appearing on behalf of the appellants and the respondent as well would only reiterate the facts and circumstances brought forth in their respective pleadings before the trial Court and the grounds of appeal in the first appellate Court and the arguments advanced therein without any new fact or circumstance being pleaded or any law being cited or argued and therefore since tracing the arguments would result in repetition of the facts extracted already herebefore, this Court is of the view that it is not at all necessary to trace the arguments and therefore it is relevant to concentrate on the grounds of appeal and the substantial questions of law pertaining to the subject.

12. So far as the grounds of appeal are concerned, the appellants would point out (i) that the evidence on record clearly establish that the second defendant's husband did not derive any title to the `A' schedule property and he was only a name lender therein; (ii) that the trial Court failed to see that during the lifetime of the father, the first defendant's son being a junior member of the family regarding the purchase of the `B' schedule property, the presumption is that it is a separate and self-acquired property of the first defendant; (iii) that the Courts have failed to see that the defendants have discharged their burden by examining the vendor of the first defendant in proof that the `B' schedule property was purchased by the first defendant; (iv) that since it is proved that the first defendant purchased the `B' schedule property from out of his own earning and from the selling of the jewels of the second defendant, the plaintiff is not

entitled to any share in the same; (v) that the courts below have failed to see that the plaintiff did not discharge her burden in proof that the `B' schedule property is the joint family property and that the same was purchased from out of the joint family funds.
13. Regarding the substantial questions of law, the appellants would raise the following substantial questions of law for determination:

(1) that when the `B' schedule property was purchased by the junior member of the family, the first defendant, during the lifetime of his father, the presumption is that it is a separate property of the junior member and in these circumstances, whether the Courts below are right in holding that it is the joint family property?
(2) when the settlement deed was given effect to, so far as the husband of the second defendant is concerned, who is only a name lender, whether the Courts below are right in holding that the husband of the second plaintiff is also entitled to `A' schedule property?

14. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, this Court is able to find that the `A' schedule property is a dwelling house constructed in an area measuring 22 1/2 feet East-West and 22 1/2 feet North-South, `B' schedule property is a land measuring 3.38 acres with a standing tamarind tree and `C' schedule property is a cash of Rs.5,000/= said to have been invested in Lakshmi Finance, Marandahalli coupled with interest, thus amounting to Rs.6,000/=.

15. Regarding the relationship of parties, the plaintiff is the daughter of one Chinnappa Udayar and the second defendant and the first defendant is her brother. Regarding the suit properties, the plaintiff's case is that the `A' schedule property was settled in favour of her parents by the parents of the second defendant, as per the settlement deed dated 15.6.1961 that is borne by Exs.A.1 and B.3, Ex.A.1 being being the original and Ex.B.3 being the certified copy, and handed over possession of the same; that on the death of her parents, the second defendant and the said Chinnappa Udayar became equally entitled to the said property and on the death of her father, the plaintiff, the first and second defendants are equally entitled to 1/3rd share from out of the half share belonging to her father. This contention of the plaintiff is denied on the part of the defendants contending that in the gift settlement deed, the plaintiff's father was a nominal party and the gift settlement was done only in favour of the second defendant and therefore nothing would go to the deceased Chinnappa Udayar resulting in the plaintiff not being entitled to any share as she is claiming to be entitled to 1/3rd share from out of the half share that is claimed to have been belonging to her father.

16. Both the trial Court and the first appellate Court, so far as this schedule of property is concerned, would admit the version of the plaintiff and in fact the trial Court would allot 1/6th share in the whole of `A' schedule property, which is a dwelling house, in favour of the plaintiff passing a decree to that effect. However, even though the contention of the

plaintiff is admitted by the first appellate Court, the first appellate Court would go into the legality and the nature of the suit being a partition suit and would observe that the plaintiff being a female member of the family, cannot independently bring the property for partition unless the male members of the property come forward to do the partition, when she would become entitled to claim 1/6th share in it and would set aside the decree passed by the trial Court.

17. So far as this property is concerned, it is the admitted case of the first appellate Court that through Exs.A.1 and B.3 settlement deeds, the father and mother i.e. the deceased Chinnappa Udayar and the second defendant got the property from Thambusami Udayar and Meenakshi Ammal, who were none other than the parents of the second defendant and after their death, respectively in the years 1971 and 1970, the parents of the plaintiff and the first defendant became independently entitled to the `A' schedule property and therefore, no doubt, so far as this property is concerned, the deceased Chinnappa Udayar became independently entitled to half share and he could deal with the same as a self-acquired property with which nobody could lay any claim excepting himself during his lifetime and since he died intestate, the plaintiff and the defendants are each becoming entitled to 1/3rd share from out of the half share of Chinnappa Udayar and therefore neither it could be said that the plaintiff is not entitled to the 1/3 rd share of the half share of her father from out of the `A' schedule property nor could it be said that she cannot ask for the partition since it is the dwelling house and is in occupation of the first defendant male member, which theory could be brought forth only in a Hindu joint family property which is not the type of property so far as the `A' schedule is concerned. Therefore, what the trial Court did in allotting the share in favour of the plaintiff is fully correct and the first appellate Court has committed an error of law so far as arriving at the conclusion that the plaintiff cannot ask for a share in `A' schedule of property. Needless to mention that so far as the judgment of the first appellate Court regarding this `A' schedule property is concerned, it becomes liable only to be set aside and the conclusions arrived at, resulting in the decree passed in favour of the plaintiff, by the trial Court is restored. However, since the respondent has not come forward to prefer an appeal or file a cross-objection against the findings of the first appellate Court, in spite of this relief being available for the respondent, this Court is unable to grant the said relief in favour of the respondent.

18. Regarding the `B' schedule property, there is no doubt so far as the character of the property or the conclusions arrived at either by the trial Court or by the first appellate Court are concerned. In fact, the first appellate Court has confirmed the decree of the trial Court so far as this property is concerned and going into the factual and legal aspects, this Court does not have any difference of opinion and is in full agreement of the views expressed and the conclusions arrived at by both the Courts below and therefore the decree passed concurrently by the trial Court and the appellate Court as well regarding the `B' schedule property are hereby confirmed. The contentions of the appellants herein, who are the defendants in the suit, so far as the `B' schedule properties are concerned, are also not sustainable in

law and therefore they are rejected.
19. So far as the `C' schedule property the cash of Rs.5,000/=, coupled with the interest sought to be decreed as Rs.6,000/= is concerned, it is neither available nor accounted for by any of these parties and therefore, since the property is not available for partition, there is no necessity to pass any orders excepting to dismiss the plea of the plaintiff, which both the Courts below have, in a concurrent manner, done rightly. The substantial questions of law are answered accordingly.

With the above observations, the above second appeal is disposed of.
However, in the circumstances of the case, there shall be no order as to costs.

Consequently, C.M.P.No.1841 of 1999 is closed.

Index: Yes
Internet: Yes
Rao

To
1.The III Additional District Judge,
Dharmapuri at Krishnagiri.

2.The Subordinate Judge,
Dharmapuri.